No. 21,235

# In the United States Court of Appeals for the Ninth Circuit

CLAROL INCORPORATED, PETITIONER

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

## BRIEF FOR RESPONDENT


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# BRIEF FOR RESPONDENT

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## THE ISSUES PRESENTED FOR REVIEW

Two principal issues are presented by Clairol's contentions in this Court. We are unable to accept Clairol's formulation of those issues, which we believe may accurately be stated as follows:

1. Section 2(d) of the amended Clayton Act forbids sellers to discriminate between their customers in payments for services rendered "in connection with the processing, handling, sale or offering for sale of any products or commodities" of the sellers, where the customers are competing "in the distribution of such

products or commodities." Competition between Clairol's beauty salon customers is conceded. The issue presented is whether there is warrant in the record and a reasonable basis in law for the Commission's holding that beauty salon purchasers of Clairol's hair care products are engaged "in the distribution of such products or commodities" within the meaning of Section 2(d), where the facts are, *inter alia*, that the payments were for the salons' advertising of the availability of Clairol products in the salons, and that in the course of rendering hair care services to customers the salon operator or employee, upon specific request from a customer, and in each separate transaction, removes the particular chosen product from its package or container, and processes, handles and applies it to the hair of the customer, who in return makes to the salon a unitary payment, part of which is for the product so applied and part for its processing, handling and application.

2. The Commission's order to cease and desist in this case was issued before, and is inappropriate in the light of, the decision in *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), in which the Court held that the term "customers" in Section 2(d) includes retailers who buy through wholesalers and compete with direct-purchasing retailers, and that any promotional payments granted the latter must be made available to the former. The issue presented concerns the form of modified order to cease and desist to be issued to conform the order to the Supreme Court's decision in *Fred Meyer, Inc.* The Commission proposes that the Court modify the order to read as follows:

IT IS ORDERED that respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers, as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of such products, unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the distribution of such products to consumers for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products, unless such payment or consideration is available on proportionally equal terms to all other beauty salon customers of respondent, including beauty salon customers who do not purchase directly from respondent, who compete with the favored beauty salon customer in the rendering of hair

care services and the use of respondent's hair care products.

## STATEMENT OF THE CASE

### The Nature of the Case

This case arises on a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of a proceeding in which the Commission determined that petitioner Clairol Incorporated, a wholly-owned subsidiary of Bristol-Myers Company, has been and is engaged in discriminatory practices prohibited by Section 2(d) of the amended Clayton Act, in connection with its sale and distribution, both directly and through various intermediate distributors, of hair care products to retail stores and beauty salons. The practices which the Commission found to be in use by Clairol Incorporated, and which it held to be forbidden by Section 2(d), are the making of payments to certain large retail store chains and to certain large beauty salon chains for their promotion and advertising of the availability of Clairol products in their stores and salons, and making payments to a retail store chain for demonstrators of Clairol products in its stores, while not making such payments available to smaller chain and independent retail stores and beauty salon customers competing with the favored customers in the distribution of Clairol products.[1]

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[1] The provisions of Section 2(d), 49 Stat. 1527; 15 U.S.C. 21(d), are as follows:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of

### The Course of the Proceedings

The administrative proceeding began on September 15, 1964, with issuance of a complaint (Tr. 1-6)[2] charging Clairol Incorporated with violating Section 2(d) of the amended Clayton Act by making payments to some of its beauty salon customers for cooperative advertising of its products while not making such payments available to the competitors of such customers, and by making payments to some of its retail store customers for promotion of its products and for in-store demonstrators of their use, while not making such payments available to the competitors of such customers (Tr. 3-4).

Clairol's answer (Tr. 7-8) admitted the payments and their nonavailability to competitors, but denied they violated Section 2(d).

A stipulation (Tr. 9-40, 42) was executed by counsel for Clairol and counsel supporting the complaint, providing that it and its attachments should constitute

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anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[2] The reference "Tr." is to the printed Transcript of the Record, which was filed in this Court before the effective date of the new appellate rules.

the evidentiary record.[3] The examiner accepted the stipulation and received it and its attachments into evidence (Tr. 41, 43).

Proposed findings and memoranda were filed by counsel for Clairol and complaint counsel,[4] and argument was heard by the examiner.[5] On July 16, 1965, the examiner issued his initial decision (Tr. 46-82) which contains findings as to the basic facts stipulated and as to additional facts inferred and concluded therefrom, his rulings of law that Clairol's practices violate Section 2(d), and a proposed order to cease and desist.

Clairol appealed to the Commission only from the examiner's rulings of law, and specifically informed

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[3] The stipulation went into great detail concerning the evidentiary facts as to which counsel could agree, but left unresolved a number of significant factual inferences and conclusions to be drawn from those facts, as to which counsel differed. The final paragraph of the stipulation provided (Tr. 40):

> This stipulation, and all documents appended hereto * * * are to be considered as the record in this proceeding for the purpose of making findings of fact and conclusions of law, and as a basis for any decision or order that may be entered by the hearing examiner or the Commission. However, this stipulation and all appended documents shall not be construed as an admission by either party as to the relevancy or substantive merit of all paragraphs of said stipulation and of all appended documents with respect to the legal issues raised by the allegations of the complaint herein.

[4] Certified record pp. 684-819, not printed.

[5] Certified record pp. 1-54, not printed.

the Commission that it was not contesting any of the examiner's findings as to the facts.[6]

**Disposition of the Case by the Commission**

On June 24, 1966, the Commission, by order (Tr. 85-87), adopted as its own the examiner's initial decision, as modified and supplemented by an accompanying opinion. In the accompanying opinion it reviewed the facts pertinent to the legal issues appealed by Clairol (Tr. 89-97), and ruled, as had the examiner, that those facts establish that Clairol's practices violate Section 2(d) (Tr. 97-109). It disagreed only with his proposed form of order, viewing it as unnecessarily broad in coverage (Tr. 109-111).[7]

The Commission found that Clairol discriminates in promotional payments between direct-purchasing chain retail store customers who compete in the distribution of Clairol products, and ruled that those discriminations are forbidden by Section 2(d). Clairol did not contest either the finding or the ruling before the Commission, and does not contest them here.

The Commission found that Clairol discriminates in promotional payments between direct-purchasing chain beauty salon customers who compete in the distribution of Clairol products, and ruled that those

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[6] Clairol's brief on appeal stated (Tr. 84):

> This case poses three legal issues. There is no disagreement over facts or even, for that matter, over inferences. The controversy is solely whether [Clairol's] conduct is proscriptively defined in section 2(d).

[7] Commissioner Elman dissented, without explanatory opinion.

discriminations are forbidden by section 2(d). Clairol contested before the examiner certain of the facts concerning the salons' processing, handling, and application of Clairol products to their customers' hair, but abandoned those issues before the Commission, and does not contend here that the relevant findings are not supported by the evidentiary record. It contended before the Commission and contends here that competition between salons is not "in the distribution of" Clairol products within the meaning of that phrase in Section 2(d) and that its discriminations between them are therefore not forbidden by the section.[8]

The Commission also found that Clairol discriminates in promotional payments between direct-purchasing retailer customers and wholesalers who resell to retailers competing directly with favored retailers, and discriminates between direct-purchasing salon customers and wholesalers who resell to salons competing directly with favored salons. Clairol did not contest those findings before the Commission and does not contest them here. The Commission ruled that discriminations between direct-purchasing customers and wholesalers selling to such customers' competitors are forbidden by Section 2(d). Clairol contested that ruling before the Commission. In this review it appears to be agreed by Clairol that the issue as to the illegality of such discriminations is settled by *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390

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[8] That issue is the first of our stated "Issues Presented for Review," *supra*, pp. 1-2.

U.S. 341 (1968), but that because the Supreme Court held that the seller's obligation is to competitors at the same functional level rather than, as the Commission had believed, to the wholesalers, the Commission's cease-and-desist order is not appropriate and must be modified with respect to Clairol's discriminations between retail stores, and also with respect to its discriminations between salons.[9]

Before the examiner Clairol made a number of contentions concerning findings which it desired the examiner to make as to the events which occur in transactions between beauty salons and their customers, in the course of which Clairol products are removed from their packages or containers, processed, handled, and applied to the customer's hair. The examiner made findings contrary to those contentions, Clairol explicitly acquiesced in those findings on its appeal to the Commission (*supra*, p. 7; see Tr. 84), the Commission adopted them, and Clairol does not contend as an issue here that those or any other of the Commission findings are not supported by the evidentiary record or are otherwise improper. We therefore take those findings as conclusively and exclusively establishing the facts of this case for this review.[10]

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[9] The necessity for modification gives rise to our second stated issue, *supra*, pp. 2-4.

[10] Facts are determined by the agency's findings, which are conclusive unless set aside on review because not supported by substantial evidence. Clayton Act, Section 11(c), 73 Stat. 243; 15 U.S.C. 21(c). Stipulations as to basic facts are substantial evidence, and the weight to be given

Throughout its brief in this Court, however, Clairol fails to mention or to recognize the existence of certain of the findings contrary to its contentions and inconsistent with its argument, and bases its argument in significant part upon assertions of purported fact not found by the Commission and contrary to the facts found. In its "Statement of Case" (Clairol brief pp. 2-8), it mentions the existence of the Commission's findings (p. 2), but thereafter ignores them entirely, presenting as supposedly settled fact what actually is a mixture of selected excerpts from the evidentiary record and assertions of purported fact contrary to facts found by the Commission.

We do not believe that the inaccuracies in Clairol's version of the findings of fact presents any issue for decision by this Court other than as to the existence and the actual content of the findings in question. The following is, we believe, an accurate summary of the relevant facts as found by the Commission, with citations to the location of the findings in the record.

**Statement of the Facts Relevant to the Issues Presented for Review**

Clairol Incorporated is a Delaware corporation with office and principal place of business at 1290

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the stipulated facts, and the inferences to be drawn from them, are for the agency to determine. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 739 (1945). An issue not raised before an agency cannot be presented to or entertained by a reviewing court. *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 500 (1955).

Avenue of the Americas, New York, New York. It is a wholly-owned subsidiary of Bristol-Myers Company, a Delaware corporation with office and principal place of business at 630 Fifth Avenue, New York, New York (Tr. 48-49; I.D. finding 8).[11]

Clairol manufactures, sells, and distributes beauty preparations, principally hair coloring products. Its sales volume of such products is among the largest in the United States (Tr. 49; I.D. finding 8); its sales exceeded $20,000,000 in 1964 (Tr. 49; I.D. finding 9).

Clairol sells its beauty products to a large number of customers throughout the United States, including independent beauty salons, beauty salon chains, beauty supply dealers, beauty schools, department stores, drug wholesalers, rack jobbers, drug retailers, and other retailers (Tr. 49; I.D. finding 10). It distributes its products throughout the country from warehouses in Stamford, Connecticut, and Los Angeles, California (Tr. 49-50; I.D. finding 11).

Clairol's products sold to the beauty trade are ultimately incorporated into hair care treatments rendered to customers of beauty salons in the salons (Tr. 50; I.D. finding 13).

Clairol sells almost all products to both the beauty trade and the drug store trade (Tr. 52; I.D. finding 17). Products sold to both trades are chemically identical except that shampoos sold to the beauty salons are in more concentrated form, and many

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[11] The reference "I.D." is to the examiner's Initial Decision, all findings of which were adopted by the Commission.

products, including the largest-selling ones, are packaged in identical sizes and in some instances in identical packages (Tr. 52; I.D. finding 18).

The chemical changes which Clairol's products undergo when applied to the hair are identical whether administered at home or in a salon. Molecular alteration of the original color molecules or "intermediates," when mixed with a dilute hydrogen peroxide solution or "developer," imparts color to the hair by becoming imbedded within the hair shaft (Tr. 54; I.D. finding 23).

Among Clairol's discriminatory payments were those made in 1963 to the salon chains of the Glemby Co., Inc., and Seligman & Latz, Inc. The Glemby Company made purchases from Clairol in the amount of $100,000, and was paid $100,000 by Clairol for its advertising. Seligman & Latz made purchases of $200,000 and was paid $218,000 for its advertising (Tr. 59-60; I.D. findings 30, 31).

Salons bill their customers with unitary charges for hair care treatments without itemizing charges for separate product and labor components, but they ordinarily intend their charges to cover their costs for all such components as well as portions of operational costs and profits (Tr. 63; I.D. finding 34).

Clairol products are applied to the hair of consumers on the premises of beauty salons by salon employees who are beauticians or hair colorists. The state licensing requirements vary from 1,000 to 2,500 hours of training in a beauty school, or 2 years in a vocational high school, and some permit apprenticeship training. An eighth grade education satisfies

most states, and some do not require any formal education (Tr. 63-64; I.D. finding 35).

Only 50 to 100 hours of operators' schooling is in hair coloring, much of which is in application of coloring to live models. While beauticians who intend to specialize in hair coloring may take additional special training, there is no requirement that those using Clairol products have any such special training (Tr. 64; I.D. finding 36).

Salon customers often specify the brand of hair coloring product to be used on their hair, and many also specify the colors or shades (Tr. 64; I.D. finding 37).

The procedures and mechanics of applying Clairol products are the same whether applied by beauticians in salons or by consumers at home, and, as Clairol insists in its advertising, its products are easy and simple to use (Tr. 65; I.D. finding 39). Some Clairol products are applied in salons by beauticians who are not skilled colorists, and Clairol shampoos, conditioners, rinses, and semipermanent colorings, which were among those subject to Clairol's discriminations, require very little skill and experience (Tr. 65-66; I.D. finding 41).

The advertisements which Clairol discriminatorily paid the favored salons for publishing always featured Clairol products and urged salon customers to get Clairol product applications or treatments (Tr. 66; I.D. finding 42). The advertisements feature Clairol products as products (Tr. 66-67; I.D. findings 43-46). The primary purpose of the advertisements

is to sell consumers on the availability of Clairol products at beauty salons (Tr. 69; I.D. finding 47).

Although a unitary fee is paid the salon for application of hair dye, and although the larger part of the fee is for the application, a part is paid in consideration of the material or dye furnished, and that part constitutes consideration for the sale of the Clairol hair dye preparation (Tr. 74; I.D. finding 61). The mere fact that the products in question are "decharacterized" in the process of their application does not change the fact that a part of the fee paid is for the Clairol product (Tr. 74; I.D. finding 62).[12] Beauty salons do in fact as well as in law sell Clairol products to their customers in the course of administering hair care and coloring treatments (Tr. 75; I.D. finding 63).

The foregoing facts are summarized from the findings of the examiner adopted by the Commission. The Commission, in its opinion on Clairol's appeal of the legal issues, also summarized them, including the factual conclusions they contain (Tr. 91-95, 96). It said that Clairol's "products distributed through beauty salons are applied to the hair of consumers on the premises of the salons" (Tr. 91), that the products are in fact "distributed to consumers in the beauty salons" (Tr. 92), that Clairol's cooperative salon advertising was "designed to sell Clairol hair coloring products to the prospective consumer" (Tr. 92-93),

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[12] Clairol concedes in its brief that the charges by beauty salons to their customers "are unitary charges for services and haircoloring products" (Clairol brief p. 12, n. 13).

that "the purpose of the advertising is to enable the particular beauty salon to sell Clairol products" (Tr. 94), that Clairol "expected the particular salon receiving advertising monies to sell [Clairol] hair coloring preparations to its customers in the course of hair coloring treatments" and "intended that beauty salon operators, aided by these advertisements, sell or distribute its hair coloring products to the consumers" (Tr. 95).

On the basis of its findings as to the relevant facts, the most significant of which are summarized above, the Commission ruled that the cooperative advertising for which Clairol pays the favored salons is a service or facility furnished "in connection with the processing, handling, sale or offering for sale" of Clairol's products within the meaning of Section 2(d) (Tr. 97), and that the type of distribution of Clairol products performed by the salons when they process, handle, and apply those products to their customers' hair constitutes "the distribution of such products or commodities" within the meaning of Section 2(d) (Tr. 97-106).

## SUMMARY OF ARGUMENT

I. The Commission's construction of Section 2(d) of the amended Clayton Act as applicable to Clairol's promotion-payment discriminations between its beauty salon customers has ample warrant in the record and a reasonable basis in law.

Clairol's basic argument is that its discriminations between salons are exempt from the coverage of Section 2(d) because its products reach the hair of salon

customers only after they have been processed and handled by the salon operators who apply them to the customers' hair, and because chemical changes take place in the course of and as a result of that processing and handling. But it is impossible that the *presence* of processing and handling of a seller's products by customers could *exempt* its discriminations from a statute which expressly *covers* transactions involving the customers' "processing" and "handling" of those products, as Section 2(d) does.

The salons' mixing and application of Clairol products to their customers' hair, which Clairol calls a "service," are what the statute calls "handling," and that mixing and the resultant chemical changes in the products in the course of their application, which Clairol calls "decharacterization," are what the statute calls "processing." Thus the very elements of the salons' transactions which Clairol relies upon, under other names, as exempting its discriminations, are expressly mentioned in the section, under their correct names, as factors which bring discriminations within its coverage, when the products are distributed by applying them to the hair.

The Supreme Court has rejected, upon comparable facts and for reasons equally applicable here, an almost identical claim of exemption made under the companion Section 2(e) of the amended Clayton Act. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945).

Where, as in this case, the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, its construc-

tion and application of that term should be upheld on review where it has warrant in the record and a reasonable basis in the law. The Commission's decision in this case meets that test.

II. It would not be an abuse of the Commission's discretion in the choice of a remedy for Clairol's unlawful practices, for the Commission to issue a modified order to cease and desist prohibiting Clairol's discriminations between any of its competing retail store customers and any of its competing beauty salon customers, whether such customers buy directly from Clairol or through one or more levels of intermediate distributors.

In this case the Commission viewed the seller's obligations under Section 2(d) as including that of making its promotional payments available to suppliers purchasing directly from it and selling to retailers competing with the favored direct-purchasing retailers. The order it issued directs Clairol to do so. That order has been rendered inappropriate by the subsequent ruling of the Supreme Court in *Fred Meyer, Inc., supra*, holding that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" for Section 2(d) purposes, and to whom the seller must make its payments available. The Commission's order in this case must be modified to conform to that ruling.

The Commission has not been able to modify the order because it does not have jurisdiction to do so while this review is pending. It has, however, determined the form of modification it wishes to make (*supra*, pp. 3-4). That modification consists essential-

ly of deleting the two sub-paragraphs which pertain to wholesalers, and adding to each of the two remaining provisions, which pertain to retail stores and beauty salons, a phrase making clear that the Clairol customers to whom it refers include retailer customers who do not purchase directly from Clairol. Such a modified order would fit both the facts of this case and Clairol's legal obligation under Section 2(d) as construed by the Supreme Court. The order should be so modified, and affirmed and enforced as modified.

## ARGUMENT

### I. Beauty salon customers of Clairol are engaged "in the distribution of" Clairol products

Clairol's basic argument is that beauty salon customers are engaged solely in performing personal services, and that Clairol's discriminations between salons are exempt from the coverage of Section 2(d) because its products reach the hair of salon customers only after they have been processed and handled by the salon operators who apply them to the customers' hair, and because chemical changes take place in them and in the hair in the course of and as a result of that processing and handling.[13] All of Clairol's other contentions are elaborations upon this argument.

The argument plainly is fallacious. It is impossible that the *presence* of processing and handling of a seller's products by customers could exempt its discriminations from coverage by a statute which in express

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[13] See Clairol's Summary of Argument, Clairol brief p. 8.

terms *covers* transactions involving the same customers' "processing" and "handling" of those products, as Section 2(d) does. That section forbids discriminatory payments to customers for services they render "in connection with the processing, handling, sale or offering for sale of any products or commodities" of the discriminating seller. The subsequent phrase, "competing in the distribution of such products or commodities," upon which Clairol relies exclusively as creating the exemption it seeks, cannot, in the face of the earlier reference to those customers' processing and handling of the products, be construed as though it read "distribution without processing or handling of such products or commodities." Yet that is the reading which Clairol's argument would require be given to the term "distribution of such products or commodities" in the section.

The salons' mixing and application of Clairol products to their customers' hair, which Clairol calls a "service," are what the statute calls "handling," and that mixing and the resultant chemical changes in the products in the course of their application, which Clairol calls "decharacterization," are what the statute calls "processing." [14] Thus the very same elements of the salons' transactions which Clairol urges as exempting its discriminations are expressly mentioned in the section under their statutory names, as among the factors which bring those discriminations within its coverage.

In view of the obviously fallacious nature of Clairol's contention it is not strange that the Commission,

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[14] See findings 54-57, Tr. 72-73.

in rejecting it, found no prior ruling exactly in point under Section 2(d); its novelty plainly is attributable to its unmistakable lack of merit. As the Commission pointed out, the decision closest in point is *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945), brought under Section 2(e) of the Act, which forbids discriminations between "purchasers of a commodity bought for resale, with or without processing," in the furnishing to them of services or facilities "connected with the processing, handling, sale or offering for sale of such commodity." [15] Sections 2(d) and 2(e) are companion provisions enacted to prevent evasion of Section 2(a)'s ban on price discriminations.[16] Section 2(d) forbids discrimina-

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[15] Section 2(e) provides in full as follows (49 Stat. 1527; 15 U.S.C. 21(e)):

> That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[16] See *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349-51 (1968), and *Simplicity Pattern Co.* v. *Federal Trade Commission*, 360 U.S. 55 (1959). In the latter case the Court, after pointing out that the Act originally prohibited only price discriminations, said (at p. 69): "A lengthy investigation * * * disclosed that several large chain buyers were effectively avoiding § 2 by taking advantage of gaps in its coverage. * * * The Robinson-Patman amendments were enacted to eliminate

tory payments to buyers for services or facilities; Section 2(e) prohibits discriminatory furnishing of services or facilities to buyers. They are, as the Commission noted (Tr. 101, n. 12), "reciprocal bans of coextensive scope irrespective of minor textual variations" (citing Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962) p. 390), and minor discrepancies in the terms of Sections 2(d) and 2(e) have been "ironed out by the courts in order to resolve [them] into a harmonious whole" (citing the Report of the Attorney General's National Committee to Study the Antitrust Law (1955) p. 189). A decision under either section of an issue common to both is therefore also decisive as to that issue under the other section.

*Corn Products* is such a decision. The contention rejected there was in all factual and legal essentials the same as Clairol's here, as the language of the Court shows most succinctly (324 U.S. at 744):

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these inequities." See also *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F.2d 439, 443 (3d Cir. 1959), *cert. denied*, 361 U.S. 923: "The purpose of [Section 2(d)] was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods." In *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168 (1960), the Court said: "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." See also *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F.2d 445, 448 (2d Cir. 1964).

> It is said also that the Curtiss Company was not a purchaser of a commodity "bought for resale, with or without processing" within the meaning of § 2(e), since the Curtiss Company buys dextrose from petitioners, but uses it with other ingredients to produce candy, an entirely new commodity, which it sells. While the Act does not define the term "processing," the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced into a different state of thing. * * * In view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale would seem to be immaterial. The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product.

In view of Clairol's contention that the processing of Clairol hair coloring products results in what it calls their "decharacterization," the precise wording of the final sentence of the Court's rejection of the same argument in *Corn Products* (loc. cit.) is particularly conclusive:

> The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold.

In this review proceeding Clairol attempts to escape that ruling and the principles upon which it was

based, by asserting that in *Corn Products* it was a fact that the dextrose reached the purchasers' customers chemically unchanged, as an ingredient of the candy, and that the Supreme Court's ruling turned upon that supposed fact, while in this case Clairol's products do not reach the salons' customers at all, but are "destroyed in the hands of" the salon.[17]

Each of these assertions is erroneous. Nothing in the Supreme Court's statement of the facts or the law in *Corn Products* suggests either that it believed the dextrose was an unaltered ingredient of the candy or that lack of alteration was a factor in its decision. Instead, it clearly implied that it believed there may have been an "alteration in the character of the commodity," and it held that any such alteration was irrelevant (324 U.S. at 744). In this case it is not a fact that Clairol products are "destroyed" in the hands of the salons and do not reach their customers; the contrary is the fact. They are processed, handled, and applied to the hair of the salon customers and perform their functions, after which they or their residues are removed. The salon customers, not the salons, seek and receive their application and their effect, and are the consumers. Thus the only difference between the actual operative facts essential to the decision in *Corn Products* and those in this case are that the processing in the former included combination with other materials while the processing in this case does not, and that there was no "handling" service in

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[17] See Clairol's brief, p. 20, n. 27.

*Corn Products*, while in this case there is. Those differences are plainly irrelevant.

Despite the irrelevance, however, Clairol argues that the presence of the handling service in the salon transactions in this case so outweighs all other factors as to convert the transactions from "distributions" of products to sales of services exclusively, rather than sales of both products and services.[18] It attempts to support that contention by citing decisions most of which involve other statutes, other practices, other Congressional purposes and other attendant circumstances. The principal decisions it relies upon are *General Shale Products Corp.* v. *Struck Construction Co.*, 132 F.2d 425, 428 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943), and *Mueller* v. *United States*, 262 F.2d 443, 447-48 (5th Cir. 1958).

Neither decision really supports Clairol's argument or militates against the Commission's ruling. Clairol's discriminations in this case are in connection with sales *to* the putative "service" firms, not in sales *by* them, as in *General Shale* (see 132 F.2d at 428). That difference is crucial; no one has contended that discriminations *by* the salons in this case among their customers, if there are any such discriminations, would violate Section 2(d), yet that is all that the ap-

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[18] Clairol brief, pp. 9-12. As previously noted (*supra* p. 14, n. 12), however, Clairol concedes in its brief (p. 12, n. 13) that the "charges for the treatments incorporating haircoloring by a beauty salon * * * are unitary *charges for services and haircoloring products* * * *" (emphasis supplied).

plication of the ruling in *General Shale* could exempt from coverage by the section. Our reliance upon that distinction is not a quibble; it was the difference which led to a result opposite to that reached in *General Shale* in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959). In that case sales of construction materials to building contractors were held within the coverage of Section 2(a). The same difference also led to opposite results in *United States* v. *Detroit Sheet Metal and Roofing Contractors Ass'n*, 116 F. Supp. 81, 87 (E. D. Mich. 1953), and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 474-75 (1952). Those two cases involved "applicators" of built-up roofing, which is made on-site of asphalt felt and hot tar. In *Detroit Sheet Metal* discriminations in sales *by* applicators were said not to be in violation of Section 2(a), while in *Ruberoid* discriminations in sales *to* applicators were among those held to be in violation of 2(a). *General Shale*, mistakenly relied upon by *Clairol*, corresponds in its facts and in principle with *Detroit Sheet Metal*, while this case corresponds in its facts and in principle with *Atlas* and *Ruberoid*. *Atlas* and *Ruberoid*, moreover, correspond in relevant facts and in principle with *Corn Products*, 324 U.S. at 731.[19] The decision in *Corn Products*, therefore, gave effect to the Congressional purpose that Sections 2(c), 2(d) and 2(e) were to prevent evasion of Section 2(a)—a

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[19] The 2(a) price-discrimination violations in *Corn Products* also involved sales of corn sugar to candy manufacturers.

purpose which would be frustrated if the exemption sought by Clairol and Corn Products were granted.[20]

Clairol also mistakenly relies upon *Mueller* v. *United States*, 262 F.2d 443 (5th Cir. 1958), as support for its contention that the fact that its products are applied to a salon customer's hair by salon employees makes what the salon sells exclusively a "service" and not a product (Clairol brief, pp. 9-10). Clairol does so by relying upon about half of a dictum by the court rather than its ruling, and by misunderstanding the Commission's statement concerning that decision in its opinion in this case. The issue in *Mueller* was whether false advertisements, of the supposed efficacy of baldness treatments in which products were applied to bald scalps, were for sales of treatments only, and not of the products applied. The part of the court's preliminary dictum which Clairol neglected to quote is (262 F.2d at 448): "On the other hand, we purchase material as well as tailoring when we buy a tailored suit." The court's dictum, it is clear, was a preliminary marking out of the inapplicable extremes between which hair treatment lies, for it immediately followed that dictum by saying (262 F.2d at 449):

> Here, however, we do not have to draw any fine distinction between the sale of a service and the

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[20] Section 2(c) has also been applied to situations like that in *Corn Products*. See, *e.g.*, *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166 (1960), where the seller's products (fruit concentrates) were processed by the buyer into apple butter and preserves. See 261 F.2d 725, 726 (7th Cir. 1958), for a recital of these facts, which were not mentioned in the Supreme Court's opinion.

> sale of a product along with a service. In this case the advertisements show that Mueller represented that the chief thing he had to offer was the miraculous effect produced by his cosmetic preparations. The sale of the office treatment was a transaction where an appreciable part of the consideration for the service was a payment for the material. In addition, Mueller sold directly to consumers his cosmetics and home treatment kits.

Thus the court held that Mueller's advertisements of office treatments were for sales of the products as well as of their application. If any part of that decision is of significance here it is the ruling concerning sale of hair treatment products, not the preliminary dictum about shaves, shoe shines, and tailored suits. As in *Mueller*, it is true here that "an appreciable part of the consideration for the service was a payment for the material." [21]

The Commission did not regard the *Mueller* ruling as dispositive here because it does not involve the Clayton Act and the Congressional purpose to prevent discriminations between customers; the Commission did, however, rely upon it as standing for "the proposition that the determination of whether a transaction constitutes a sale of a product must be decided on the basis of all the surrounding circumstances in the particular proceeding" (Tr. 98-99). *Mueller* clearly stands also for the general proposition that a seller's application of a product to the person of its customer does not preclude a holding that the product is being

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[21] See *supra*, p. 14; p. 24, n. 18.

sold, as also does this Court's decision in *Ratigan* v. *United States*, 88 F.2d 919, 921-22 (9th Cir. 1937), *cert. denied*, 301 U.S. 705.

Clairol also mistakenly relies upon a number of other decisions, principally product-liability cases, which plainly have nothing to do with a reviewing court's decision as to the construction which should be given to the provisions of a remedial statute, such as the amended Clayton Act, by the administrative agency principally charged by Congress with the responsibility of construing, applying and enforcing it and the policies it embodies. The law of sales, as applied in product-liability cases in which a manufacturer may escape liability for damages for injuries from the use of its products, no matter how valid it may be as applied to private contract or tort circumstances in those cases, cannot be used as a bar to administrative, remedial and preventive enforcement of federal antitrust policy. Compare *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18 (1964).[22]

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[22] Much of Clairol's argument depends upon its preliminary contention (Clairol brief pp. 13-15) that the term "distribution" in Section 2(d) is synonymous with "resale." Although that contention is essential to Clairol's argument, its rejection is not essential to the Commission's decision, because the Commission properly determined, on the basis of the actual facts and the authority of *Corn Products*, that the salons' transactions include resales of Clairol products. But, as the Commission pointed out (Tr. 103, n. 13), its holding "does not mean that for Section 2(d) to apply there must be a 'resale' in all cases. We merely hold here that once the Commission finds that a transaction may be equated with a

As the Supreme Court stated in *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367 (1965), "where the Congress has provided that an

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resale, it necessarily satisfies the requirement of distribution under Section 2(d)."

The Congressional purpose in adding Section 2(d) to the Act was to protect small competitors from discriminations in favor of "large buyer customers." S. Rep. No. 1502, 74th Cong., 2d Sess., 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess., 15-16 (1936). Nothing in the reports suggests that the only buyers the Congress sought to protect were those whose "distribution" consisted exclusively of resales, and its choice of language in Section 2(d) strongly suggests the contrary. The language, including the term "distribution," was adopted in 1936. Webster's *New International Dictionary* (2d Ed. 1938) contains no definition equating the words "distribute" or "distribution" with "resale." The former it does define, however, as "1. To divide among several or many; to deal out; apportion; allot," and gives as synonyms "share, assign, divide." It gives a similar definition of "distribution," and also: "8. *Econ. a* Physical conveyance of commodities from producers to consumers; transportation," and gives as synonyms "apportionment, allotment, dispensation, disposal, dispersion, arrangement."

Alsager, *Dictionary of Business Terms* (1932) 95, gives a similar definition: "Distribute—To divide among several; to classify; to assort." It too gives no definition suggesting a sense equivalent to "resale."

Schwartz, *Dictionary of Business and Industry* (1954) 181, gives a single definition of "distribution": All of the activities involved in the passage of goods from the producer to the consumer."

Certainly the salons' transactions fit the stated Congressional purpose and those definitions, whether or not they also constitute sales of Clairol products. Thus, both of the contentions essential to Clairol's argument are erroneous.

administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision 'has "warrant in the record" and a reasonable basis in law'." See also *United States* v. *Drum*, 368 U.S. 370, 375-76 (1962), *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 (1944), and *Gray* v. *Powell*, 314 U.S. 402, 411 (1941). In the latter case the Court said: "In a matter left specifically by Congress to the determination of an administrative body * * * the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing * * * and an application of the statute in a just and reasoned manner." See also *P. Lorillard* v. *Federal Trade Commission*, 267 F.2d 439, 443-44 (3d Cir. 1959), *cert. denied*, 361 U.S. 923, and *Purolator Products, Inc.* v. *Federal Trade Commission*, 352 F.2d 874, 883-84 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045.

Upon the facts of this case, and in view of the language and purposes of the statute, we submit that the Commission's construction of Section 2(d), as applicable to Clairol's promotion-payment discriminations between its beauty salon customers, has ample warrant in the record and a reasonable basis in law.

**II. The modified order proposed herein is reasonably related to the violations of law found by the Commission, and conforms to the Supreme Court's decision in *Fred Meyer, Inc.***

In this case the Commission, as it had in *Fred Meyer*, viewed the seller's obligation under Section 2 (d) as including that of making its promotional pay-

ments available to suppliers purchasing directly from it, and reselling to direct competitors of favored direct-purchasing retailers (Tr. 107-108). It accordingly drafted a form of cease-and-desist order requiring Clairol to do so, with respect both to retail stores and beauty salons (Tr. 85-87). That order was issued before the decision in *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), in which the Court held that it is not the wholesalers themselves, but their retailer customers, who are the seller's "customers" for Section 2(d) purposes, and to whom the seller must make its payments available. That decision has rendered inappropriate the form of order issued by the Commission in this case, which therefore must be modified to accord with the Supreme Court's ruling.

Because Section 11(d) of the amended Clayton Act (73 Stat. 243; 15 U.S.C. 21(d)) provides that upon filing the record the reviewing court acquires exclusive jurisdiction of the matter, the order in this case has not been modified by the Commission. Although the Commission has not been able to act formally, it has informally considered the matter and determined the form of modified order it believes should be entered in this case. The modification consists essentially of deleting sub-paragraphs 1(b) and 2(b), which pertain only to wholesalers, adding to sub-paragraphs 1(a) and 2(a), which pertain respectively to retail stores and beauty salons, the phrase "including retailer customers who do not purchase directly from respondent," and redesignating those two as paragraphs 1 and 2. As so modified it would read as follows:

IT IS ORDERED that respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers, as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of such products, unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the distribution of such products to consumers for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products, unless such payment or consideration is available on proportionally equal terms to all other beauty salon customers of respondent, including beauty salon customers who do not purchase directly

from respondent, who compete with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products.

This proposed modified order differs in three principal respects from the modifications which Clairol asks this Court to make (Clairol brief pp. 28-29).

First, the modified order would be in two paragraphs, the first treating discriminations with respect to retail stores and the second treating discriminations with respect to salons. Clairol's proposed modification would result in an order in two paragraphs, each containing two sub-paragraphs, the first sub-paragraph treating discriminations between direct purchasing customers and the second treating discriminations involving customers buying through wholesalers. In so doing Clairol's proposal would follow the format of the Commission's original order, made necessary there by the Commission's conception of the seller's obligation, and no longer necessary in view of the Supreme Court's different concept of that obligation. We believe it is obvious that issuance of an order drafted in such consolidated paragraphs would not be an abuse of the Commission's discretion.

Second, the foregoing proposed modified order would require Clairol to make its payments available to competing retail stores and to competing beauty salons regardless of how many levels of intermediate distributors intervene between Clairol and the stores or salons. The modifications of the order which Clairol suggests that the Court make would not require proportionally equal payments to any customer buy-

ing through more than one level of intermediate distributors. The Supreme Court's ruling in *Fred Meyer, Inc.*, as to the seller's obligation was not limited as to number of intermediaries between the seller and its retail-level "customers." Such a limitation would be contrary to the intent of the statute, noted by the Court in *Fred Meyer, Inc.* (390 U.S. at 352), "to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read customer as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of § 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class."

The Congressional purpose was to protect all competing small retailers, including those who may purchase through more than one level of intermediate distributors, not merely those who purchase through only one level. The substance and rationale of the *Fred Meyer, Inc.*, decision is that Section 2(d) requires a seller who makes promotional payments to or for the benefit of a distributor of its products at any functional level, to make proportionally equal payments available to all other distributors of those products competing with the favored distributor at that level.

There was no finding in this case that Clairol products never reach the retail level through more than one level of intermediate distributors. The Commission found (Tr. 49, I.D. finding 10) that Clairol sells its products to, *inter alia*, customers named as "beauty supply dealers," "drug wholesalers," and "rack

jobbers." There was no finding that all of those named intermediaries sell only directly to retail stores or to salons, and even if there had been such a finding, it would not require limitation of the order's coverage. Commission orders are supposed to close all roads to the prohibited goal, so that they may not be by-passed with impunity. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-29 (1957). Clairol's proposed order would enable it to continue its discriminations by the device of selling to disfavored customers only through two or more levels of intermediate distributors. We believe it is obvious that it would not be an abuse of the Commission's discretion for it to issue an order not so easy to by-pass.

The third difference between the foregoing proposed modified order and the modifications which Clairol asks this Court to make is also in the order's prohibitory coverage. The Commission's proposed order would prohibit all discriminations between competing Clairol customers regardless of whether they purchase directly or through intermediaries. Clairol's proposed order would not do so. It would prohibit discriminations only where the favored customers, or both the favored and disfavored customers, purchase directly. It would not prohibit discriminations where the favored customer, or both the favored and disfavored customers, purchase through intermediaries. We believe it is clear that it would be appropriate for the Court to modify the Commission's order so that it could not be by-passed by selling to favored customers only through intermediate distributors.

In *National Lead*, *supra*, 352 U.S. at 428, the Court said that "the Commission is clothed with wide discretion in determining the type of order that is necessary to bring to an end the unfair practices found to exist," and is "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed." It held that the Commission "has wide latitude and judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Accord*, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

Accordingly, we request that the Court modify the Commission's order to cease and desist as suggested herein, after which the Commission, at the appropriate time as provided in Section 11(i) of the Clayton Act (15 U.S.C. 21(i)), will modify its order to comply with the judgment of the Court.

## CONCLUSION

For the foregoing reasons the Commission's order should be modified as requested and affirmed and enforced as so modified.[23]

Respectfully submitted.

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Washington, D. C.

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[23] "To the extent that the order of the Commission * * * is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission * * *." Clayton Act, Sec. 11(c), 73 Stat. 243, 15 U.S.C. 21(c).

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